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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 71

INTERNATIONAL WORKERS ORDER, INC. AND ARTHUR LOWNDES DRAYTON,
Petitioners,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 819

INTERNATIONAL WORKERS ORDER, INC. AND ARTHUR LOWNDES DRAYTON,

Petitioners,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners herein pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the District of Columbia, rendered March 22, 1950, affirming a judgment of the United States District Court for the District of Columbia dismissing the complaint of petitioner International Workers Order, Inc. against the above named respondents [1] and denying the application of petitioner Drayton for leave to intervene in the proceeding.

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[1] The complaint originally named Tom C. Clark, Attorney General, as a defendant. By order of the Court of Appeals (R. 61), J. Howard McGrath was substituted.

Summary of the Matter Involved

On February 18, 1949, the petitioner International Workers Order, Inc. (hereinafter referred to as the I. W. O.) filed a complaint requesting a declaratory judgment and injunction against the Attorney General and the members of the Loyalty Review Board of the United States Civil Service Commission (hereinafter called the Board) (R. 2, 33). On the same date, petitioner Drayton, an employee of the Post Office Department, sought leave to intervene, add an additional cause of action against and joint as defendants the members of the Loyalty Board of the Post Office Department (R. 32).

No answer to the complaint was filed. Respondents filed motions to dismiss the complaint (R. 57) and to deny the application for intervention (R. 57). The motions were granted. The allegations of the complaint and petition for intervention which for these purposes must be accepted as true, may be summarized as follows:

The I. W. O. is licensed to operate and does operate as a non profit fraternal and insurance society in 18 states and the District of Columbia, embracing 185,000 members (R. 5, 6).

The I. W. O. functions as an interracial federation of national group societies to which its members belong according to their national origin or descent. It is the only interracial fraternal benefit society in the United States which forbids discrimination and segregation in its organization and which welcomes the Negro people into membership (R. 7).

The I. W. O. as part of its fraternal activities has fostered and encouraged various cultural and educational programs designed to preserve the cultural heritages and artistic values developed over the years by the peoples of the different countries of the world to the end that these cultures and values may be integrated into American life (R. 8).

The life insurance protection carried by the membership is in excess of $120,000,000 and the assets of the I. W. O. are approximately $5,000,000 in a ratio of 145% of liabilities or 45% in excess of insurance law requirements (R. 8).

The I. W. O. is strictly supervised by the insurance departments of the various states in which it carries on its business and activities and files a comprehensive annual report in each of such states (R. 10).

The I.W.O. is expressly dedicated to the democratic ideals and traditions of the United States and to the principles of freedom and equality embodied in the Constitution, and is opposed to the commission of acts of force or violence, to the denial of rights to any person and to the altering of our form of government by any illegal or unconstitutional means (R. 13, 14).

On March 25, 1947, the President of the United States issued Executive Order 9835, establishing an employees loyalty program in the executive branch of the federal government. Part III, Section 3 of the Order provided that the Loyalty Review Board established thereunder, shall be furnished by the Attorney General the names of organizations designated by him "after appropriate investigation and determination" as "totalitarian, fascist, communist or subversive or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means" (R. 14, 15).

In November 1947, the Attorney General provided the Board a list of organizations, so designated by him, including the I.W.O. (R. 3).

The I.W.O. never received any notice or hearing with respect to such designation (R. 15).

This designation is completely contrary to fact in that the purposes, objectives and activities of the I.W.O. are in no sense "subversive", it is not an organization within the meaning of Part III, Section 3 of the Executive Order and it has not adopted any policy of advocating or approving the commission of acts of force or violence or to deny other persons their rights under the Constitution or as seeking to alter the form of government by unconstitutional means (R. 12).

In December 1947, the Board publicized the listing of the Attorney General and disseminated the information to the federal departments and agencies for use in the determination whether individuals should be dismissed from federal employment or denied the same on the basis that "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." (Ex. Order III, (3) (a), V (1)). In the determination of this issue, there is considered the individual's "membership in, affiliation with or sympathetic association with" any organization on the Attorney General list. (id., V(2) (f)).

As a direct result of the actions of the respondents, the I.W.O. has suffered and is threatened with even greater pecuniary loss and deprivation of valuable contractual rights and other property interests. The specific allegations to this effect include: Many members (particularly present federal employees or prospective applicants for such employment) have resigned or withdrawn from membership in the I.W.O., thereby discontinuing their payment of dues and cancelling their insurance. The Commissioner of Internal Revenue has revoked the tax exempt status of the Order. Departments of Insurance in the several states in which the I.W.O. is licensed have been instigated to initiate proceedings to revoke such licenses, thereby jeopardizing the valuable property interests which it has in such

licenses and franchises. Subordinate bodies of the I.W.O. have been hampered in obtaining the use of public schools, private homes and in renting halls and similar places for the conduct of meetings, rallies, social and recreational affairs necessary for the proper functioning of the I.W.O. Members of the I.W.O. who have pending petitions for naturalization have been denied naturalization or have had their petitions held in abeyance because of their membership in the I.W.O. Employees in private plants, which have government contracts, have been or are threatened with discharge because of their membership, or that of members of their families, in the I.W.O. Many potential members, especially present and prospective civil servants, have declined and will continue to decline to become members of the I.W.O. The I.W.O. and its members have been vilified and have suffered public shame, disgrace and economic injury (R. 16, 17, 18).

The petitioner Drayton in his specific cause of action alleges that he is and has been for more than 24 years employed by the Post Office Department as a clerk under the classified civil service; that he is and has been a member of the I.W.O., and that he desires to continue such membership with its established valuable insurance rights and benefits, that the respondents constituting the Post Office Department Loyalty Board have served him with charges looking toward his dismissal solely because of his membership in the I.W.O., that in such proceedings, the designation of the I.W.O. as "subversive"[2] by the Attorney General will be final, binding and conclusive, and that his dismissal on the charges preferred against him would be equivalent to a criminal stigmatization of him and would result in his disqualification not only from public but from

[2] This term "subversive" is used to embrace all the categories referred to in Part III, Section 3 of Executive Order 9835.

private employment; and that he has no adequate remedy at law (R. 53, 54, 55).[3]

The complaint alleged that the Executive Order on its face and as construed and applied by the Attorney General and the actions of the respondents were unconstitutional (R. 19, 20).

The relief requested was for a declaratory judgment to such effect and an injunction directing the respondents to remove the name of the I.W.O. from the "subversive" list, desist from further designating or publicizing the Order as a subversive organization, and restraining the dismissal of petitioner Drayton because of his membership in the I.W.O. (R. 22, 56).

Opinions Below

The judgment of the District Court dismissing the complaint and denying leave for intervention (R. 58) was affirmed by the Court of Appeals for the District of Columbia on March 22, 1950, Edgerton, J. dissenting, (still unreported).

The majority opinion, written by Miller, J. found that the act of the Attorney General in designating the I.W.O. as subversive to be within the scope of the Executive Order and not a subject for judicial review at the suit of the designated organization, that any injury suffered by the I.W.O. because of the Attorney General's subversive designation was "an incidental result" and "Not being directly affected thereby, it lacks the interest which it must have in order

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[3] In the minority dissenting opinion of the Court below, there is the following comment: "After this appeal was argued, and in response to an inquiry from the bench during the argument of *Washington, et al. v. McGrath*, No. 10413, the Department of Justice informed us that a finding of 'reasonable grounds for belief' that Drayton is disloyal has been made by the Post Office Department Loyalty Board and affirmed by the Postmaster General."

to maintain the action." The majority opinion in addressing itself to Petitioner Drayton held that the lower court's denial of leave for intervention was not an abuse of discretion and in any event not a final order and therefore not appealable.

The dissenting opinion found for the reasons stated in his dissent in the case of *Joint Anti-Fascist Refugee Committee* v. *Clark*[4] that the I.W.O. had "standing to sue" where it "alleges grave and irreparable financial injury caused by a permanent government regulation" and "litigate the question whether its constitutional rights are denied." In addition Edgerton, J. found that the District Court erred in denying leave to the petitioner Drayton to intervene and that such denial was an abuse of discretion.

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on March 22 (R. 70).

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254.

Statute and Order Involved

Section 9A of the Hatch Act (Act of August 2, 1939, c. 410, Sec. 9A, 53 Stat. 1148, 5 U.S.C.A. Sec. 118j):

> "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position

[4] Certiorari granted by this Court in the case on March 13, 1950.

or office held by him and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

Executive Order 9835, 12 F. R. 1935, issued March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government" provides in part as follows:

PART III, SEC. 1

There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the

President from time to time as may be necessary to the maintenance of the employee loyalty program.

PART III, SEC. 3

The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART V

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, or documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Questions Presented

1. Whether the petitioners, alleging that the actions of the respondents have caused them grave pecuniary loss and seriously impaired their rights to speak and assemble, may contest the constitutionality of such actions as designating the I. W. O., contrary to fact, as a subversive organization, in the absence of appropriate investigation and determination and of any due process procedures, in widespread dissemination of such listing and applying the listing in connection with the eligibility of Drayton for continuance in federal employment.

2. Whether the Attorney General in designating the I. W. O., contrary to fact, as a subversive organization under Executive Order 9835 violated the Ninth and Tenth Amendments.

3. Whether the Attorney General violated the Fifth Amendment in having acted in the absence of any procedural due process of law.

4. Whether the Attorney General violated the First Amendment by abridging the petitioners' freedoms of speech and assembly.

5. Whether the relief requested by the petitioners, on the basis of the complaint, can be granted.

Reasons for Granting the Writ

The writ should be granted because (1) this case presents substantially the same legal issues, of great constitutional and public importance, as those raised in *Joint Anti Fascist Refugee Committee* v. *Clark* in which the Court has granted certiorari. 70 Sup. Ct. Rep. 573, and (2) certain vital facts present in this case but not in the Joint Anti Fascist case give crucial support to the position of the petitioners.

1. Essentially the same legal issues of great constitutional and public importance are presented in this and the Joint Anti Fascist Refugee Cases.

The petitioners have alleged grave and irreparable injury to property interests and to their enjoyment of freedoms of speech and assembly, resulting directly from action taken by the Attorney General and other Executive officials under Executive Order 9835. The actions were taken without the slightest semblance of procedural due process of law.

Nevertheless the court below held that the Attorney General's action, in designating the I.W.O. as a subversive organization for the purposes of the Executive Order (though denied by the I.W.O. in the complaint as factually untrue) (1) was merely an expression of advice to the Executive Department in the government's process of exer-

cising its authority to select its employees and (2) did not directly apply or result in any direct injury to the I.W.O., and therefore not subject to judicial review. The Court even stated that "If he (the Attorney General) was mistaken as to the true character of I.W.O., no court can cause him to change his conclusion."

The petitioners contend that on the basis of the facts set forth in the complaint, which are uncontested, they have a legal standing to challenge the constitutionality of the actions of the respondents in designating the I.W.O., contrary to fact, as a subversive organization, in the absence of appropriate investigation and determination and of any due process procedures, in widespread dissemination of such listing and applying the listing in connection with the eligibility of petitioner Drayton for continuance in Federal employment. *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18; *Columbia Broadcasting System* v. *United States,* 316 U. S. 407; *Waite* v. *Macy,* 246 U. S. 606.

We further contend that the complaint sets forth valid causes of action against the respondents in that (1) their actions abridge the petitioners' freedoms of speech and assembly protected by the First Amendment, *Ex Parte Endo,* 323 U. S. 283; *Thomas* v. *Collins,* 323 U. S. 516; See Emerson and Helfeld, Loyalty Among Government Employees, 58 Yale L.J.I; (2) such actions were taken without procedural due process of law and therefore in violation of the Fifth Amendment, *Morgan* v. *U. S.,* 301 U. S. 292, In re *Oliver,* 333 U. S. 257, See O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592; and (3) such actions are in excess of any power vested in the Executive and constitute a violation of the Ninth and Tenth Amendments, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

This Court has already determined to review the Joint Anti Fascist case. There is no need to encumber this petition with a repetition of the basic reasons which have already been urged in the Joint Anti Fascist case for the granting of certiorari.

We desire to point out that there are additional and important facts in this case, but not found in the Joint Anti Fascist case, which should have a vital and material bearing upon the crucial questions involved.

2. Additional important facts in this case which have a direct bearing on legal issues involved.

First, the majority opinion of the Circuit Court of Appeals in the Joint Anti Fascist case relied in part upon the fact that the complaint failed to assert affirmatively that the plaintiff was not an organization within the scope of the Executive Order. The Court therein stated "The complaint contains no express denial that the Committee falls within the designation made by the Attorney General. In view of the extraordinary relief sought by way of equity a denial would seem to be appropriate. This is, in no sense, a simple action for libel." 177 Fed. 79, 81.

In the instant case, the I.W.O. specifically affirms that its subversive designation by the Attorney General is contrary to fact. In addition the complaint sets forth at length the specific policies of the I.W.O. to prove that its designation by the Attorney General is contrary to fact. The I.W.O. has also pointed out that as a licensed fraternal and insurance society authorized to conduct its business in 18 States and the District of Columbia, it is under the direct and closest scrutiny and supervision of the Department of Insurance of those States, with an annual reporting required.

Thus, no greater demonstration could possibly be made than that presented by the I.W.O. in its complaint, which

is unchallenged, that the action of the Attorney General taken against the I.W.O. does not have the slightest justification in fact or law and therefore can be properly challenged.

Second, the I.W.O. in its complaint sets forth clearly defined property interests as having been directly affected by the action of the Attorney General and specifically described pecuniary loss to the I.W.O. resulting therefrom.

For example, the complaint describes the insurance features of the I.W.O. Its members, solely through such membership, hold insurance policies which are paid for by their dues. A resignation or withdrawal from membership in the I.W.O. by any individual necessarily involves a loss of all his insurance rights and benefits. The I.W.O. therefore has definite and concrete existing contractual relationships with its members. The complaint alleges that as a direct result of the subversive designation of the I.W.O. by the Attorney General, many of its members, some of whom are federal employees, resigned their membership in the I.W.O. thereby cancelling their insurance contracts with the I.W.O. with consequent loss of dues for the I.W.O. and of insurance rights and benefits for the members.

The majority of the Court below was apparently troubled by these facts and felt compelled to make a specific answer to the question whether such facts did not require a different legal conclusion from that reached in the Joint Anti-Fascist case.

> "It is true that I.W.O. differs from the Refugee Committee in some respects, but in our view those differences do not distinguish the two cases. The Committee was an unincorporated association dependent for financial support upon voluntary contributions, while I.W.O. is a business corporation with income from insurance premiums which it says has been impaired by the action of the appellees. It has therefore a property right

> which is legally protected, as it claims, but nevertheless the statute and the Executive Order have not been 'applied' to I.W.O. by the appellees, that is to say I.W.O.'s property right in its income from insurance premiums has not been directly affected by the action taken under the Executive Order."

We respectfully except, of course, to the conclusion reached by the Court below. It is a sheer distortion of the facts presented in the case to maintain that the "grave and irreparable financial injury caused by a permanent government regulation" is a mere indirect consequence of the action of the Attorney General and therefore cannot be challenged. Because of the minority dissenting Justice's contrary decision as to the causal relationship between the action of the Attorney General and the injury complained of, he held on the basis of the clearly defined interference with contractual and constitutional rights: "Its (I.W.O.) standing, is, I think, even clearer than that of the appellant in the Joint Anti Fascist case."

It is difficult to see how the Columbia Broadcasting Case, supra can be distinguished from this case on the issue of legal standing to sue. It not only furnishes authority in support of our position, but the language of Mr. Chief Justice Stone might almost have been written to fit the facts here. In that case, the Federal Communications Commission had issued a statement of general policy to the effect that radio stations whose contracts with broadcasting networks contained certain specified provisions would not secure renewal of their licenses from the Commission and might even have their existing licenses revoked. The plaintiff network sought to restrain the Commission from putting its policy into effect, alleging that several stations had refused to renew their contracts with the plaintiff and that others threatened to do so.

The Commission contended the plaintiff network had no legal standing to sue on the grounds that (1) the statement issued by the Commission did not "apply" to the network but merely to the individual stations and (2) the statement did not operate as a binding regulation imposing obligations but was merely equivalent to a press release.

The Chief Justice dismissed both objections.

In the instant case, similarly, the arguments that the action of the Attorney General merely applied to federal employees and not to the I.W.O. and constituted only advice to the Executive, must be rejected in the face of the facts set forth in the complaint.

The I. W. O. has alleged that as a fraternal insurance society it has contractual relations with its members through the insurance policies; that as a direct result of the actions of the Attorney General, members have terminated their membership which has meant an automatic cancellation of their insurance policies with resulting pecuniary loss to the I. W. O. and such members. The reason for such resignations must be obvious. A federal employee who was a member of the I. W. O. had a simple choice: if he desired not to endanger his job, he had to resign from the I. W. O.; if he desired to keep his insurance and membership in the I. W. O., he had to resign from his federal employment. The case of the petitioner Drayton is ample proof that a member of the I. W. O. who is a federal employee, following the action of the Attorney General in listing the I. W. O. as a subversive organization, could not continue both his membership and employment.

The respondents' claim that the Attorney General's action is a mere expression of advice and therefore not reviewable by judicial action is precisely the issue covered by the Chief Justice in his opinion in the Columbia Broadcasting case: "The Commission's contention that the regulations are no more reviewable than a press release is hardly

reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant". 316 U. S. 407, 422. So here, the Attorney General's subversive listing forwarded to all other federal agencies, and in the case of the petitioner Drayton actually used, as a basis for dismissal of federal employees who, are members of the I. W. O. cannot be construed as a mere press release.

Third, this case, as distinguished from the Joint Anti Fascist case, presents the claim not only of the I. W. O. but that of a federal employee who is a member of the I. W. O., against whom charges have been filed under the Executive Order solely because of his membership in the I. W. O., whose subversive designation cannot be contested by the employee in any administrative proceeding.

Petitioner Drayton, as a member of the I. W. O. and a federal employee, confronted as a result of the Attorney General's action under the Executive Order with a most difficult Hobson's choice, seeks relief as an intervenor in the proceeding. He says in his proposed cause of action "Plaintiff has no administrative remedy since all of the defendants hold that the designation of the Order is final and conclusive with respect to the status, character and rights of the Order not only as to them but as to plaintiff as well and that plaintiff may not at any state of the administrative process be heard with respect thereto" (R. 55).

This allegation cannot be contested since it is confirmed by the Loyalty Review Board. See Loyalty Review Board, Memorandum No. 2, March 9, 1948.

In the Joint Anti Fascist case, the Court denied relief to the Committee plaintiff, in part, on the ground that it could not assert the injury to its members. "If the Committee means to assert claims in behalf of its members reputedly disgraced by reason of the designation, it is enough to point out that only the members themselves are

entitled to complain of any personal injuries they may suffer. Likewise, only the members, not the Committee, can seek redress for alleged impairment of members' constitutional rights of freedom of speech and assembly'' 177 F. 2d 79, 83.

Drayton's application for leave to intervene presented a claim which had common questions of law and fact with the main action and asserted a right for relief ''arising out of the same transaction, occurrence or series of actions and occurrences'' (R. 32).

In view of the fact that no other appropriate proceeding is available to Drayton and certainly no showing was made before the District Court that his intervention would delay or prejudice the adjudication of the rights of the original parties, the denial of his application for leave to intervene was an abuse of discretion.

We submit that the factual differences between the instant case and the Joint Anti Fascist case, which we have noted, have an important and material bearing upon the legal issues involved. The writ, requested herein, should therefore be granted in order that this case in view of its special facts may be heard independently but in view of the similarity of legal issues be considered by the Court along with the Joint Anti Fascist case.

Conclusion

The writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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